

DETAILED ACTION

Claims 2, 5-10, 12, 14, 19-28 and 33-35 have been cancelled. Claims 1, 3, 4, 11, 13, 15-18 and 29-32 are pending and under examination.

The indicated allowability of claim 26 is withdrawn by the current Examiner in view of the newly discovered reference(s) to Chaudhry et al. US 5,804,202. Rejections based on the newly cited reference(s) follow.

Comment: In claim 3, line 3 "radial" is a misspelling of radical. In claim 18, line 3, "undec1" appears to be a misspelling of undecyl.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1, 3, 4, 11, 13, 15-18 and 29-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO/99/42521 (equivalent in English-US 6,375,959) in view of FR 97- 04876 (English equivalent US 6,353,034) and Chaudrey et al. (US 5,804,202).

Applicant claims a self invertible inverse latex composition comprising an oil phase; aqueous phase; at least one emulsifying agent of water in oil type; at least emulsifying agent of oil in water type and from 20 to 70% by weight of a branched or crosslinked polyelectrolyte.

Determination of the scope and content of the prior art

(MPEP 2141.01)

The references of WO/99/42521 (equivalent in English-US 6,375,959) and FR 97- 04876 (English equivalent US 6,353,034) have been discussed in detail in the previous Office Action.

'959 teaches the use of octyl palmitate in the cosmetic composition (column 9, lines 55-65). '959 teaches mixtures of polyalkylglucosides in the compositions (column 9, example 14 and column 11 examples 19 and 20, for example). '959 teaches using Montanov 68™ which is taught as being a self emulsifying cetearyl glucoside composition (column 16, lines 35-39 and examples 30 and 34, for example). '959 also teaches acrylamide/ sodium 2-acrylamido-2-methylpropanesulphonate copolymers as thickeners (column 1, lines 20-35). 25-40% water-in-oil emulsifiers and 75-60% oil-in-

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water emulsifiers are specified (column 2 lines 48-52). 15-40% oil phase is taught (column 2 lines 54-57). '959 teaches that European legislation might make it impossible to use acrylamide monomers in the future (column 1, lines 36-40).

'034 teaches glucose and xylose residues for the alkylglucoside (column 4, lines 14-20). '034 teaches alkyl chain lengths of 14, 16, 18, 20 and 22 carbon atoms (column 2, lines 35-65). '034 teaches that Montanov 86™ comprises a mixture of polyalkylglucosides (column 1, lines 38-43).

Chaudrey et al. teach a water in oil emulsion containing a polymeric material with monomer components (a) acrylamide; (b) 2-acrylamido-2-methyl-propanesulphonic acid (AMPS) and (c) a crosslinking agent with a molar ratio of (a)/(b) of from 85/15 to 15/85 for providing a thickened composition when formulated (Claim 16). Chaudrey et al. teach "inverse latex" polymerization technique (column 1, lines 49-55; column 3, lines 32-35; lines 55-60). Chaudrey et al. teach that mixtures of emulsifiers and other additives can be added before, during or after the polymerization process (column 4, lines 33-48). Chaudrey et al. teach a water in oil inverse emulsion with 60 mol% acrylamide and 40 mol % sodium salt of AMPS crosslinked with MBA to produce an inverse emulsion (column 6, lines 50-67). Chaudrey et al. teach a variety of personal care products with the inverse emulsion (column 7, line 15 through column 9, line 25).

Ascertainment of the difference between the prior art and the claims

(MPEP 2141.02)

1. The difference between the instant application and '959 is that '959 do not expressly teach the crosslinked copolymer of AMPS and acrylamide in a molar ratio between 50/50 and 30/50 in the inverse latex composition. This deficiency in '959 is cured by the teachings of Chaudrey et al.

2. The difference between the instant application and '959 is that '959 do not expressly teach octyl palmitate in the oil phase.

3. The difference between the instant application and '959 is that '959 do not expressly teach R4 in formula II representing octyl, decyl, undecyl, dodecyl, tetradecyl or hexadecyl radical. This deficiency in '959 is cured by the teachings of '034.

Finding of prima facie obviousness

Rational and Motivation (MPEP 2142-2143)

1. It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to use acrylamide/AMPS copolymer of Chaudrey et al. in the inverse emulsion of '959 and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because: 1) the monomer of '959 and the copolymer of Chaudrey et al. both function as thickeners in cosmetic compositions; and 2) '959 suggests the copolymer as a thickener but cautions that potential legislation might make it impossible to use acrylamide in the composition. However, no such legislation existed at the time of the invention and one of ordinary skill in the art would be free to select that copolymer as suggested by '959.

2. It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to use octyl palmitate in the inverse emulsion of '959 and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because '959 suggests using plant oil or synthetic oil or mixtures of oils in the oil phase (column 2, lines 58-65) and further disclose a composition with octyl palmitate as discussed above. Therefore, '959 directs one of ordinary skill in the art to using this synthetic oil. Chaudrey et al. establish that additives can be added to the copolymer at any stage of the polymerization process. Thus, in the absence of evidence to the contrary, there is no difference between adding octyl palmitate to the inverse latex composition before or after formulation as a product.

3. It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to use an alkyl glycoside in the inverse emulsion of '959 and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because: 1) '959 already teaches alkyl glycosides in the final composition; and 2) Chaudrey et al. teach that the emulsifying agents can be added before or after polymerization and '034 teaches alkyl polyglycosides as emulsifying agents (column 1, lines 19-20). Thus, in the absence of evidence to the contrary, there is no difference between adding alkyl glycosides to the inverse latex composition before or after formulation as a product.

A reference is good not only for what it teaches by direct anticipation but also for what one of ordinary skill in the art might reasonably infer from the teachings. (*In re*

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Opprecht 12 USPQ 2d 1235, 1236 (Fed Cir. 1989); *In re Bode* 193 USPQ 12 (CCPA) 1976).

In light of the forgoing discussion, the Examiner concludes that the subject matter defined by the instant claims would have been obvious within the meaning of 35 USC 103(a).

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1, 3, 4, 11, 13, 15-18 and 29-32 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-11 of U.S. Patent No. 7,033,600 in view of WO/99/42521 (equivalent in English-US 6,375,959) and FR 97- 04876 (English equivalent US 6,353,034) and Chaudrey et al. (US 5,804,202). Although the conflicting claims are not identical, they are not patentably distinct from each other because the instantly claimed subject matter embraces or is embraced by the patented subject matter. The cited references are discussed above and those discussions are hereby incorporated by reference into the following rejections.

US 7,033,600 discloses:

1. A cosmetic, dermopharmaceutical or pharmaceutical composition, characterized in that said composition comprises an oil phase, an aqueous phase, at least one emulsifier of water-in-oil (W/O) type, at least one emulsifier of oil-in-water (O/W) type, in the form of an inverse latex, said composition comprises from 0.1% to 10% by weight of said inverse latex and said inverse latex comprises from 20% to 60% by weight of a branched or crosslinked anionic polyelectrolyte based on partially or totally sulfated 2-methyl-2-[(1-oxo-2-propenyl)amino]-1-propanesulfonic acid, copolymerized with acrylamide, the organic solvent constituting the oil phase of said inverse latex comprises isohexadecane.

The missing ingredients are all taught in the art and the comprising language of 7,033,600 does not preclude their addition.

One of ordinary skill in the art would have recognized the obvious variation of the instant invention over the patented subject matter.

Claims 1, 3, 4, 11, 13, 15-18 and 29-32 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 7-16 and 19-24 of U.S. Patent No. 6,673,861 in view of WO/99/42521 (equivalent in

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English-US 6,375,959) and FR 97- 04876 (English equivalent US 6,353,034) and Chaudrey et al. (US 5,804,202). Although the conflicting claims are not identical, they are not patentably distinct from each other because the instantly claimed subject matter embraces or is embraced by the patented subject matter.

US 6,673,861 discloses:

1. A composition, comprising:
an oil phase, an aqueous phase, at least one emulsifying agent of water-in-oil (W/O) type and at least one emulsifying agent of oil-in-water (O/W) type in the form of a self-invertible inverse latex comprising from 20% to 70% by weight of a branched or crosslinked polyelectrolyte, wherein
a constituent solvent of the oil phase is selected from the group consisting of squalane and hydrogenated polyisobutene, and the polyelectrolyte is selected from the group, consisting of a homopolymer based on a monomer having a partially or completely sulfated strong acid functional group and a copolymer based on at least one monomer having a partially or completely sulfated strong acid functional group copolymerized with acrylamide with a crosslinking and/or branching agent of dialkylacetic acid or one of its salts; or

The missing ingredients are all taught in the art and the comprising language of US 6,673,861 does not preclude their addition.

One of ordinary skill in the art would have recognized the obvious variation of the instant invention over the patented subject matter.

Claims 1, 3, 4, 11, 13, 15-18 and 29-32 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-9 of U.S. Patent No. 7,348,016 in view of WO/99/42521 (equivalent in English-US 6,375,959) and FR 97- 04876 (English equivalent US 6,353,034) and Chaudrey et al. (US 5,804,202). Although the conflicting claims are not identical, they are not

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patentably distinct from each other because the instantly claimed subject matter embraces or is embraced by the patented subject matter.

US 7,348,016 discloses in claims 1-6:

1. A self-reversible reverse microlatex composition comprising the following:

- (i) an oil phase;
- (ii) an aqueous phase;
- (iii) at least one water-in-oil (W/O) surfactant;
- (iv) at least one oil-in-water (O/W) surfactant; and
- (v) a branched or a crosslinked polyelectrolyte, wherein, the water-in-oil (W/O) surfactant and the oil-in-water (O/W) surfactant together as a mixture have a total Hydrophile Lipophile Balance (HLB) from about 9.5 to about 10 so to enable formation of a water-in-oil self-reversible reverse microlatex.

2. The composition, according to claim 1, wherein said oil phase is from about 25% to about 50% of the total weight of the composition.

3. The composition, according to claim 2, wherein said oil phase is from about 30% to about 40% of the total weight of the composition.

4. The composition according to claim 1, wherein said polyelectrolyte is from about 15% to about 40% of the total weight of the composition.

5. The composition, according to claim 4, wherein said polyelectrolyte is from about 20% to about 30% of the total weight of the composition.

6. The composition according to claim 1, wherein, said polyelectrolyte is at least one homopolymer or copolymer, or a combination thereof, said homopolymer is at least one monomer containing a strong acid function, and said copolymer is selected from the group consisting of: at least one monomer containing a strong acid function copolymerized with at least one monomer containing a weak acid function or with at least one neutral monomer.

The missing ingredients are all taught in the art and the comprising language of US 7,348,016 does not preclude their addition.

One of ordinary skill in the art would have recognized the obvious variation of the instant invention over the patented subject matter.

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Claims 1, 3, 4, 11, 13, 15-18 and 29-32 provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-32, 35 and 36 of copending Application No. 11/850,989 in view of WO/99/42521 (equivalent in English-US 6,375,959) and FR 97- 04876 (English equivalent US 6,353,034) and Chaudrey et al. (US 5,804,202). The copending application teaches in claim 1:

1. A self-reversible reverse microlatex composition comprising:
an oil phase;
an aqueous phase;
at least one water-in-oil (W/O) surfactant;
at least one oil-in-water (O/W) surfactant; and
a branched or a crosslinked polyelectrolyte, wherein,
the water-in-oil (W/O) surfactant and the oil-in-water (O/W) surfactant together as a mixture have a total Hydrophile Lipophile Balance (HLB) from about 8.5 to about 11 so to enable formation of a water-in-oil self-reversible reverse microlatex.

The copending application further teaches acrylamide and AMPS as the polyelectrolyte monomers(claims 9 and 15 for example). The missing ingredients are all taught in the art and the comprising language of copending application does not preclude their addition.

One of ordinary skill in the art would have recognized the obvious variation of the instant invention over the copending subject matter.

This is a provisional obviousness-type double patenting rejection.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Pays et al. (US 2006/0104936), which claims foreign priority to FR 0211105 filed on 9/6/02, clearly claims acrylamide/AMPS copolymers in cosmetic compositions (claims 1 and 7). Pays et al. thus establish that it is possible to use acrylamide copolymers in cosmetic products in contrast to the hypothetical concerns expressed in '959.

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ernst V. Arnold whose telephone number is 571-272-8509. The examiner can normally be reached on M-F (6:15 am-3:45 pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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